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9 UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF OREGON

11 In Re:) Bankruptcy Case
12 VINCE LEE WEBB,) No. 03-69708-fra7
13 _____)
Debtor.)
14 CHRIS FAIN and VALERIE FAIN,) Adversary Proceeding
15 Plaintiffs,) No. 05-6020-fra
16 vs.)
17 VINCE LEE WEBB,)
18 _____) MEMORANDUM OPINION
Defendant.)

19 Defendant filed a motion for an order requiring Plaintiffs to pay
20 Defendant's attorney's fees, pursuant to Fed. R. Bankr. P. 9011. The
21 Court finds that Plaintiffs and their counsel did in fact violate the
22 rule, and that sanctions should be imposed. However, the Court declines
23 to impose attorney's fees.

24 The circumstances leading to the instant motion are described in
25 detail in the Court's memorandum opinion filed August 26, 2005 [Document
26 No. 33]. To summarize: Plaintiffs filed a complaint alleging that

1 Defendant acquired certain property of the bankruptcy estate post-
2 petition, and knowingly and fraudulently failed to report the acquisition
3 to the Trustee, and failed to deliver the property to the trustee. The
4 complaint sought to revoke the Defendant's discharge pursuant to 11
5 U.S.C. § 727(d)(2). At the hearing on Defendant's motion for summary
6 judgment, Plaintiffs' counsel stated that Plaintiffs contended that the
7 specified assets were in the possession and control of the Debtor at the
8 petition date, but were omitted from his schedules. Accordingly, the
9 court proceeded with the case under 11 U.S.C. § 727(d)(1), the correct
10 provision for seeking to revoke discharge for intentional omission of
11 assets from a debtor's schedules. As it turned out, Defendant had
12 disclosed, through his schedules and subsequent interviews with the
13 Trustee the existence of the assets (except for a computer server farm,
14 about which more later) and his possession of them. Either Plaintiff
15 Chris Fain, or one of his attorneys, or both, were present at the
16 interviews, so that Mr. Fain and/or his attorneys had knowledge of the
17 Defendant's disclosures prior to the time the complaint was filed.

18 An additional item of property was a computer server farm. Mr.
19 Fain alleged that the Defendant had come into possession of a particular
20 computer server, property of the estate, without disclosing it. He
21 assumed this to be true because the Defendant had contacted him with a
22 proposal that the Plaintiff purchase a server farm from the Defendant. He
23 did not investigate this tenuous conclusion, which ultimately proved not
24 to be true.

25 Defendant's motion asserts - and Plaintiffs do not dispute - that
26 Defendant advised the Plaintiffs of these circumstances and demanded that

1 the complaint be withdrawn. The Plaintiffs refused to do so, whereupon
2 Defendant filed his motion for summary judgment. The motion was allowed.

3 The Defendant now seeks an order finding that Plaintiffs' conduct
4 violated Federal Rule of Bankruptcy Procedure 9011, and seeks, by way of
5 a sanction, an order requiring the Plaintiffs to pay Defendant's
6 attorney's fees. The matter was heard on November 29, 2005. Both
7 parties participated, but neither submitted any evidence. Accordingly,
8 the Court will consider the matter based on the record made during the
9 course of the litigation.

10 I. DISCUSSION

11 A. *Federal Rule of Bankruptcy Procedure 9011*

12 Rule 9011 provides, in pertinent part:

13 (a) SIGNATURE. Every petition, pleading, written motion,
14 and other paper, except a list, schedule, or statement, or
15 amendments thereto, shall be signed by at least one attorney
16 of record in the attorney's individual name. A party who is
17 not represented by an attorney shall sign all papers. Each
paper shall state the signer's address and telephone number,
if any. An unsigned paper shall be stricken unless omission
of the signature is corrected promptly after being called to
the attention of the attorney or party.

18 (b) REPRESENTATIONS TO THE COURT. By presenting to the
19 court (whether by signing, filing, submitting, or later
20 advocating) a petition, pleading, written motion, or other
21 paper, an attorney or unrepresented party is certifying that
to the best of the person's knowledge, information, and
belief, formed after an inquiry reasonable under the
circumstances, -

22 (1) it is not being presented for any improper
23 purpose, such as to harass or to cause unnecessary
24 delay or needless increase in the cost of
litigation;

25 (2) the claims, defenses, and other legal
26 contentions therein are warranted by existing law
or by a nonfrivolous argument for the extension,
modification, or reversal of existing law or the
establishment of new law;

1 (3) the allegations and other factual contentions
2 have evidentiary support or, if specifically so
3 identified, are likely to have evidentiary support
4 after a reasonable opportunity for further
5 investigation or discovery; and
6 (4) the denials of factual contentions are
7 warranted on the evidence or, if specifically so
8 identified, are reasonably based on a lack of
9 information or belief.

6 (C) SANCTIONS. If, after notice and a reasonable
7 opportunity to respond, the court determines that
8 subdivision (b) has been violated, the court may, subject to
9 the conditions stated below, impose an appropriate sanction
10 upon the attorneys, law firms, or parties that have violated
11 subdivision (b) or are responsible for the violation.

12 * * *

10 (2) Nature of Sanction; Limitations. A sanction
11 imposed for violation of this rule shall be
12 limited to what is sufficient to deter repetition
13 of such conduct or comparable conduct by others
14 similarly situated. Subject to the limitations in
15 subparagraphs (A) and (B), the sanction may
16 consist of, or include, directives of a
17 nonmonetary nature, an order to pay a penalty into
18 court, or, if imposed on motion and warranted for
19 effective deterrence, an order directing payment
20 to the movant of some or all of the reasonable
21 attorneys' fees and other expenses incurred as a
22 direct result of the violation.

18 Rule 9011 is derived from Federal Rule of Civil Procedure 11, and
19 cases construing that rule are applicable to cases construing Rule 9011.
20 See In re Rainbow Magazine, 136 B.R. 545 (9th Cir. BAP 1992). While once
21 mandatory, imposition of sanctions, once a violation is found to have
22 occurred, is within the discretion of the trial court. Roundtree v.
23 United States, 40 F.3d 1036 (9th Cir. 1994).

24 B. Violation

25 An essential element of a claim under 11 U.S.C. § 727 (d)(1) is
26 that the Plaintiff have no knowledge of the alleged fraudulent conduct

1 prior to the entry of an order discharging the debtor. As explained in
2 the court's Memorandum Opinion, allowance may be made where a party
3 learns of an alleged fraud after the deadline for objecting to an entry
4 of discharge under 11 U.S.C. § 727(a), but before the order of discharge
5 is entered. However, Plaintiffs were on notice of the extended deadline
6 for objection to discharge, and were present when Defendant disclosed to
7 the Trustee the existence of the assets, and his possession.
8 Nevertheless, the Plaintiffs failed to institute an action objecting to
9 discharge, and improperly filed a complaint to revoke discharge after the
10 deadline had run. While it might be said that this is a relatively
11 technical matter, any mitigation that may be derived from that fact is
12 overcome by the fact that Defendant put Plaintiffs on notice of the
13 defect in their position, and Plaintiffs nevertheless persisted with the
14 litigation.

15 With regard to the server farm, Plaintiffs had nothing more than a
16 plausible hypothesis: that, if Defendant was trying to sell them
17 something, and the Defendant had previously an article of the same
18 description, it must necessarily be selling the originally acquired
19 property. A minimal investigation would have determined that this was
20 not the case. Such investigation is required by the rule, and
21 Plaintiffs' failure to conduct the investigation constitutes a violation
22 of the rule.

23 C. Sanctions

24 Rule 9011(c)(2) requires that the sanction be limited to what is
25 sufficient to deter repetition of the conduct complained of. Sanctions
26 may be monetary or nonmonetary. If "warranted for effective deterrence,"

1 the sanction may be or include an order directing the payment of some or
2 all of the movant's attorney's fees.

3 Whatever form the sanction may take, it must comply with the
4 applicable rule: that it be designed to deter proscribed conduct, and
5 that it go no further than what is required to do so. It follows that
6 the Court must be provided with evidence allowing it to ascertain the
7 impact of the proposed sanctions on the party upon who they are to be
8 imposed. With respect to monetary sanctions, this includes an inquiry as
9 to the subject parties' ability to pay. See In re Braun, 152 B.R. 466
10 (N.D. Ohio 1993) (holding that a sanctioning court must make some inquiry
11 into an attorney's ability to pay a monetary sanction, and remanding the
12 case for such determination.) The moving party has the initial burden of
13 providing evidence on this point. The movant here declined to do so.
14 The Court will not engage in any presumption regarding either Plaintiffs'
15 counsel's ability to respond to a financial sanction, whether in the form
16 of a fine or a fee-shifting order. Accordingly, any fine imposed must be
17 minimal.

18 It is within the Court's discretion to impose nonmonetary
19 sanctions, and the Court believes it is appropriate to do so in this
20 instance. This is particularly so in light of the fact that the parties
21 concerned here are opposing parties in another adversary proceeding
22 before this Court, Adversary No. 04-6088-fra Fain v. Webb.

23 In light of the foregoing, the Court will enter an order imposing
24 the following sanctions:

25 1. Requiring Plaintiffs to pay a fine of \$500 to the Clerk of the
26 Court within 60 days of the date of the order;

2. Requiring counsel for Plaintiffs to pay a fine of \$500 to the Clerk of the Court within 60 days of the date of the order;

3. Any pleading filed by or on behalf of the Plaintiffs in any other proceeding before this Court is to be accompanied by an unsworn declaration of Plaintiffs, as provided in 28 U.S.C. § 1746, attesting to the truth of any allegations made. With respect to pending litigation, Plaintiffs shall provide an unsworn declaration attesting to the truth of any allegation made in any pleading filed by them or on their behalf prior to the date of this order;

4. Counsel for Plaintiffs shall, within 24 months of the date of the order, certify to the Court that he has obtained continuing legal education regarding Federal Civil Procedure, and, specifically, Federal Rule of Civil Procedure 11. The CLE may be obtained in any manner permitted by the Continuing Legal Education Rules of the Oregon State Bar.

II. CONCLUSION

The foregoing constitutes the Court's findings of fact and conclusions of law. An order consistent herewith has been entered.

F. H. Hays

FRANK R. ALLEY, III
Bankruptcy Judge